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In The

Supreme Court of the United States

October Term, 1978

No. 78-571

GERALD L. BLUCHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DONALD J. SULLIVAN
SULLIVAN, VAN COURT & FITZGERALD, P.C.
1807 Capitol Avenue
Cheyenne, Wyoming 82001
Attorneys for Petitioner
Gerald L. Blucher

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

———o———

Petitioner Gerald L. Blucher prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in favor of the respondent in this action on July 31, 1978.

———o———

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It will appear, together with the order denying rehearing, at — F. 2d — and is printed in Appendix B.

———o———

JURISDICTION

The opinion of the Court of Appeals printed in Appendix B was filed and a judgment entered in accord therewith on July 31, 1978. A petition for rehearing was filed on August 8, 1978, and an order denying rehearing, printed in Appendix A, was entered on September 5, 1978. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

———o———

QUESTIONS PRESENTED

1. May the Government deliberately obtain the mailing of material believed to be obscene into a federal district of its choice for the purpose of obtaining jurisdiction for a criminal prosecution, where no other contact exists between the defendant and the subject jurisdiction? May the government fabricate jurisdiction?

2. May a District Court constitutionally exercise jurisdiction in a criminal prosecution under the Comstock Act where the sole contact between the defendant and the

community is the mailing of allegedly nonmailable material into the district at the request of the government, made for the purpose of obtaining criminal jurisdiction in a community where it would otherwise not exist?

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves questions as to the proper exercise of federal criminal jurisdiction within the limits set by the Constitution. Article III, Section 2, Paragraph 3 provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be held at such Place or Places as the Congress may by Law have Directed.

The Sixth Amendment provides:

> In all criminal prosecution , the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

The "continuing offense" venue provision of Title 18, United States Code, Section 3237(a) provides, in its second paragraph:

> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and

prosecuted in any district from, through, or into which such commerce or mail matter moves.

The Comstock Act, under which this prosecution was brought, is Title 18, United States Code, Section 1461. Its lengthy provisions are printed in Appendix C.

———o———

STATEMENT OF THE CASE

The Factual Background

Postal authorities in Portland, Oregon, monitored the activities of appellant, a resident of that community, for several years, suspecting that he was engaged in the mailing of nonmailable material.

At no time to or during this period did appellant have any contact whatever with Wyoming. He never lived there, nor travelled there, nor did he mail any material to Wyoming during this time.

After a lengthy period of surveillance of appellant, the postal agents in Oregon contacted the postmaster in Pine Bluffs, Wyoming, a community of some two thousand people on the Wyoming-Nebraska border. They requested that the Pine Bluffs postmaster set up a mail drop, using a false name, write to the appellant and order sexually oriented materials. The Oregon authorities supplied money orders with which to carry on this plan.

The Pine Bluffs, Wyoming postmaster did as requested, and wrote to appellant in Portland, Oregon, requesting sexually oriented material. Appellant sent advertising materials to the name and address in Wyoming

in response to these requests. On three occasions the Pine Bluffs postmaster wrote to appellant in Oregon to order specifically designated types of materials, and appellant complied with these requests, again sending the material to the Pine Bluffs, Wyoming address.

The events stated were the only contact appellant ever had with the State of Wyoming or the community of Pine Bluffs. It was engineered by the government for the purpose of bringing a criminal prosecution in the District of Wyoming, rather than in any other district with which appellant might have had genuine contact.

The Proceedings in the Courts Below

Solely on the basis of the contrived contact described above, appellant was indicted by a federal grand jury in Wyoming on twenty counts of violating the Comstock Act, Title 18, United States Code, Section 1461. By appropriate motions, appellant challenged the jurisdiction of the District Court in Wyoming and the legality of the proceeding, as well as the Comstock Act itself. At motion argument on December 2, 1976, the District Court, without opinion, overruled all motions. Appellant thereupon entered a plea to one count and the government dismissed the remaining counts. The question of jurisdiction and constitutional validity of the proceedings was expressly reserved for appellate review.

The Tenth Circuit, in an opinion dated July 31, 1978, printed as Appendix B, upheld the conviction.

———o———

BASIS OF FEDERAL JURISDICTION

Jurisdiction was asserted in the United States District Court for the District of Wyoming, on the basis of Title 18, United States Code, Section 3237 (a). This assertion of jurisdiction is challenged by appellant.

———o———

REASONS FOR GRANTING THE WRIT

1. The issue is the constitutionally permissible limit of the exercise of federal criminal jurisdiction in a factual context never before decided.

No decision, save that in the court below, has ever faced the problem squarely presented here.

The only case in which the problem of "engineering" of jurisdiction for prosecutorial purposes is even suggested is *Hamling v. United States*, 418 U. S. 87 (1974), in which Mr. Justice Brennan's dissent foretells the very kind of conduct which is now before the Court. This question, of maneuvering a suspect to mail materials into a preselected community so that he might be prosecuted there, was not before the Court in *Hamling*, and was not decided by it.

Yet the issue involves the critical question of constitutionally permissible limits of federal criminal jurisdiction. The Constitution mandates in two separate provisions, in Article III, Section 2, Paragraph 3, and again in the Sixth Amendment, that prosecutions shall be at the place of the crime. The "continuing offense" provision

of Title 18, United States Code, Section 2327 (a) expands venue and jurisdiction concepts to their maximum, by providing *inter alia* that a prosecution for unlawful use of the mails may be prosecuted at the place of mailing, or the place of delivery, or at any place through which the mailed object travels. The facts in this case go even beyond this extended range; dissatisfied with the forum where appellant lived and carried on his activities, and dissatisfied with the other communities available to it (based on lengthy observation of appellant's activities) the government set out to induce appellant to mail nonmailable material to a community which the government had preselected as a favorable site for a Comstock Act prosecution.

If the postal authorities had intercepted appellant's mail and carried it to some remote location out of its normal route, no prosecution could properly be maintained in that remote community. Here they set out to induce appellant to do the same thing for them, so that they could then prosecute him in a forum of their choice.

The courts have never spoken on this form of prosecutorial conduct, nor on such an exercise of federal criminal jurisdiction. In view of the novelty of the question, and the role of this Court in supervising jurisdictional matters, it is appropriate for the question raised in this case to be decided by this Court.

2. The decision below conflicts with principles enunciated by this Court in Hamling v. United States.

The long struggle to determine appropriate standards for measuring alleged obscenity culminated in the decision of this Court in *Hamling v. United States*, 418 U. S. 87

(1974). The Court decided that community standards of obscenity should prevail, rather than one single standard for the entire nation. The suggestion of a uniform standard of obscenity, to which all persons in all areas must conform, was expressly rejected.

But the effect of the decision below is to ignore the "community standards" principle and impose one single national standard. If the government may elect in advance the community where it wishes to bring Comstock Act prosecutions, and if the federal district court in the preselected community may assert jurisdiction over persons who come in contact with that community only upon the solicitation of the government, then all persons and all speech must be judged by the standards of that community, whose mores will be binding throughout the nation.

This is not what the Court intended in *Hamling;* it is, however, the effect of the decision below, and should not be permitted to stand.

3. The conduct challenged here is of growing frequency and concern.

Energetic prosecutors may reliably be expected to utilize methods which tend to ensure successful prosecutions, and the ability to preselect a community most sympathetic to a Comstock Act prosecution is such a tool. Indeed, the Tenth Circuit opinion below candidly acknowledges that this system of easy prosecutions is beginning to appear. *See* Tenth Circuit opinion, printed as Appendix B, at footnote one.

4. The Tenth Circuit opinion itself suggests the propriety of review by this Court.

Appellant submits that the opinion of the Tenth Circuit in this case virtually solicits a review by this Court in the limited circumstance where an accused mails materials to a community at the request of government agents planning a prosecution. The question is whether the government may by its own conduct create contact with a community and then take advantage of the expanded venue and jurisdiction provisions of the "continuing offense" statute despite the Constitutional mandate of trial at the place of the offense. The Tenth Circuit indicated that it felt bound by *Hamling, supra,* while acknowledging that this situation was not decided in that case. The opinion seems to encourage a decision on the point by this Court:

"The case we have before us today illustrates that the foreboding has turned to reality. . . . Yet, so long as *Hamling* is the law publishers and distributors everywhere who are willing to fill subscriptions nationwide are subject to the creative zeal of federal enforcement officers who are free both to shop for the venue from which juries with the most restrictive views are likely to be impanelled and to select for prosecution the materials, publishers and distributors which their subjective judgment dictates."

———o———

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD J. SULLIVAN
SULLIVAN, VAN COURT & FITZGERALD, P.C.
Teton Building
1807 Capitol Avenue
Cheyenne, Wyoming 82001

Attorneys for Petitioner
Gerald L. Blucher

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

August Term—September 5, 1978

Before The Honorable Oliver Seth, The Honorable William E. Doyle, and The Honorable Monroe G. McKay, Circuit Judges

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No. 77-1065

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GERALD L. BLUCHER,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, it is ordered, the petition for rehearing is denied.

/s/ Howard K. Phillips, *Clerk*

APPENDIX B

PUBLISH

(Filed July 31, 1978)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1065

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GERALD L. BLUCHER,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Wyoming

(D. C. Criminal Case No. CR-76-121-K)

Donald J. Sullivan, Cheyenne, Wyoming, for Defendant-Appellant.

Lawrence A. Bobbitt, III, Assistant United States Attorney, Cheyenne, Wyoming, (Toshiro Suyematsu, United States Attorney, and Frederic C. Reed, Assistant United States Attorney on the brief) for Plaintiff-Appellee.

Before SETH, Chief Judge, DOYLE and McKAY, Circuit Judges.

McKAY, Circuit Judge.

Dissenting in *Hamling v. United States,* 418 U. S. 87 (1974), Mr. Justice Brennan expressed the foreboding that:

> The 1958 amendments to § 1461 constituted the mailing of obscene matter a continuing offense under 18 U. S. C. § 3237. The practical effect of this amendment—intentionally adopted by Congress for that express purpose—is to permit prosecution "in the Federal district in which [the disseminator] mailed the obscenity, in the Federal district in which the obscenity was received, or in any Federal district through which the obscenity passed while it was on its route through the mails." . . . Under today's "local" standards construction, therefore, the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials. See *United States v. Palladino,* 490 F. 2d 499, 503 (CA1 1974) (Coffin, C. J.). National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people. For it "would tend to restrict the public's access to forms [of sexually oriented materials] which the [United States] could not constitutionally suppress directly . . . a censorship . . . hardly less virulent for being

> privately administered [, for] [t]hrough it, the distribution of all [sexually oriented materials], both obscene and not obscene, would be impeded." *Smith v. California,* 361 U. S. 147, 154 (1959). Thus, the people of many communities will be "protected" far beyond government's constitutional power to deny them access to sexually oriented materials. A construction that has such consequences necessarily renders the constitutionality of amended § 1461 facially suspect under the First Amendment.

Id. at 143-45 (Brennan, J., dissenting).

The case we have before us today illustrates that the foreboding has turned to reality.[1] The defendant distributor of published materials resided in Oregon, a state where the "community standard" seems more tolerant of varying personal habits than most.[2] The record does not reflect that defendant ever resided, traveled through, or had any business contacts in the State of Wyoming prior to the time when an Oregon postmaster asked a Wyoming postmaster to use a false name and address to solicit by mail materials distributed by defendant. This communication between postmasters was made for no apparent reason other than a subjective judgment that a Wyoming venire would hold a more restrictive "community standard."[3]

1 See United States v. Dost, Nos. 76-1829 and 76-1830 (10th Cir., filed May 1, 1978), where the same enforcement and venue shopping technique was used to elect New Mexico substantive law over California law on obscenity.

2 For example, Oregon is one of only a handful of states which have decriminalized the possession and use of small quantities of marijuana. 1977 Or. Laws ch. 745, § 54 repealed Or. Rev. Stat. §§ 167.207 (3), 167.217, effective July 1, 1978.

3 For example, in contrast to those states which have decriminalized the use of marijuana, Wyoming law continues to make possession and use of small quantities of marijuana a criminal offense punishable by imprisonment for not more than 90 days, or a fine of not more than $100, or both. Wyo. Stat. § 35-347.39 (Supp. 1975).

Defendant willingly responded to the mail order requests of Wyoming postal officials. On 17 occasions over a three year period, he mailed advertisements giving information where, how, and from whom allegedly obscene materials could be obtained. On three occasions in the same time period he mailed such materials.

Defendant's only contacts with the State of Wyoming were those initiated and pursued by Federal postal authorities in Wyoming. Based solely on these contacts, defendant was indicted on 20 counts of violations of 18 U. S. C. § 1461 (1976) in an action brought in Wyoming Federal District Court. Facing the prospect of prosecution before a Wyoming jury on all 20 counts under Wyoming community standards of obscenity, defendant pleaded guilty to one count and reserved an appeal on the legality of this prosecution. The government dismissed the remaining 19 counts.

On appeal defendant complains that the liberal venue provisions of 18 U. S. C. § 3237 (1976) compounded by the application of local obscenity standards under *Hamling* deprive him of due process. Yet, so long as *Hamling* is the law,[4] publishers and distributors everywhere[5] who are

4 The majority in *Hamling* expressly rejected the arguments of Justice Brennan, although the question of 18 U. S. C. § 3237 was not directly at issue in that suit brought in the same district from which the nonmailable materials were sent. The majority opinion stated:

> Our Brother Brennan suggests in dissent that in holding that a federal obscenity case may be tried on local community standards, we do violence both to congressional prerogative and to the Constitution. Both of these arguments are foreclosed by our decision last

(Continued on next page)

willing to fill subscriptions nationwide are subject to the creative zeal of federal enforcement officers who are free both to shop for the venue from which juries with the most restrictive views are likely to be impanelled and to select for prosecution the materials, publishers and distributors which their subjective judgment dictates.

AFFIRMED.

Judge Doyle concurs in the result.

(Continued from previous page)

> Term in *United States v. 12 200-ft. Reels of Film, supra,* that the *Miller* standards, including the "contemporary community standards" formulation, applied to federal legislation. The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions.

418 U. S. at 106. In addition to *Hamling,* lower federal courts that have spoken to this issue have unanimously concluded that it is both permissible and logical to try a defendant in the district to which he allegedly mailed obscene materials. United States v. Slepicoff, 524 F. 2d 1244, 1249 (5th Cir. 1975), *cert. denied,* 425 U. S. 998 (1976); United States v. Various Articles of Obscene Merchandise, 433 F. Supp. 1132, 1137 (S. D. N. Y. 1976) (dicta), *rev'd,* 562 F. 2d 185 (2d Cir. 1977), *petition for cert. filed,* 46 U. S. L. W. 3569 (U. S. Mar. 2, 1978) (No. 77-1226); United States v. Elkins, 396 F. Supp. 314 (C. D. Cal. 1975), *rev'd on other grounds,* 556 F. 2d 978 (9th Cir. 1977).

5 This, of course, includes such widely acclaimed magazines as National Geographic Magazine with its graphic illustrations of stories about primitive marriage and adoption rites. *See, e. g.,* 141 National Geographic Magazine 388-90, 396 (1972). The editors regularly receive letters from readers suggesting that the reader's notion of community standards for acceptable sexual depiction have been offended. Telephone interview with a staff member, Research and Correspondence Section, National Geographic Society, Wash., D. C. (July 6, 1978).

APPENDIX C

The Comstock Act, Title 18, United States Code, Section 1461, provides:

> Every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance; and—
>
> Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and
>
> Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001 (e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assasination.